



Statement to the Response Systems Panel

25 September 2013

**Brigadier General Richard C. "Rich" Gross
Legal Counsel to the Chairman of the Joint Chiefs of Staff**

Thank you for this opportunity to discuss our commitment to eliminating sexual assault from the Armed Forces of the United States.

The Chairman and the entire Joint Staff are firmly committed to removing the stain of sexual assault from our ranks. This pernicious foe has no place in our military. On the Joint Staff, our job is two-fold – first, we are often asked to help coordinate among the Services, and serve as a liaison between them and the senior civilian leadership of the Pentagon; second, we are responsible ourselves for developing potential military-wide solutions to identified problems, and helping facilitate their dissemination within the Services. In both of those capacities, I can faithfully report that we are doing our utmost to combat sexual assault within the United States military.

On 14 August 2013, the Secretary of Defense, with the recommendation and the support of the Joint Chiefs of Staff, approved seven executive actions to complement the pre-existing 2013 Sexual Assault Prevention and Response Action Plan and the eight other executive actions he had previously announced in a 6 May 2013 memo. As these fifteen major initiatives and a solid campaign plan are rolled out through the Services, we also need time to assess their impact. While changes to the military justice system are considered, as they should be, we must also be aware that in many ways, we are shooting at a moving target. The military is improving on this matter every day.

As more attention and interest focuses on the issue of sexual assault within the military, we have been presented with many good ideas and have embraced much change as we strive to address this problem. I am very optimistic about the promise that these executive actions hold, and believe they will be a great complement to some of the most promising and productive pieces of legislation pending in Congress.

The remainder of my remarks focus on three central themes: first, the need for careful and deliberate study before changing the military justice system, in order to avoid unintended consequences; second, the role of the commander; and third, what I've learned talking to my allied counterparts about their justice systems and the role of the commander in those systems.

As you well know, the military justice system is complex, and major changes require careful, deliberate study. The current military justice system, created in 1950, was carefully crafted by Congress over the course of two years after numerous hearings, testimony from lawyers and non-lawyers, and painstaking drafting. Since that time, Congress has made major changes to the Code on only one occasion, when it enacted the Military Justice Act of 1968 after months of hearings and testimony.

Many provisions are interconnected, and changes to one may have major second- and third-order effects and unintended consequences. Previous rapid changes, such as those made in 2007 to Article 120, resulted in provisions being held unconstitutional, increasing the potential for overturned convictions.

Dramatic changes to the Uniform Code of Military Justice, such as removing commanders from disposition decisions without careful study/consideration of impact, increase the likelihood of unintended consequences. Some of these unintended consequences may harm the very victims that legislation proposing to remove commanders is trying to protect.

The considerable deliberation that went into the Military Justice Act of 1983, the last bill to provide comprehensive UCMJ reform, proves the potential for successful reform through a measured approach. I very much support the mission of this Panel – and I hope that the process undertaken by the Panel

continues to be deliberate. While some changes likely can be made to the military justice system that specifically address sexual assault, other changes may have more far-reaching consequences, and may be better considered by a body charged with UCMJ reform in general. For this reason, the Chairman and the Joint Chiefs recommended to the Secretary of Defense that he direct the DoD General Counsel to conduct a comprehensive, holistic review of the UCMJ and the military justice system.

As we consider further reforms, the role of the commander should remain central. Our goal should be to hold commanders more accountable, not render them less able to help us correct this crisis. The commander's responsibility to preserve good order and discipline is essential to effecting change. They punish criminals and protect victims when and where no other jurisdiction is capable, or lawfully able to do so. Commanders are accountable for all that goes on in a unit. Ultimately, they are responsible for mission success. However, there are proposed changes to the military justice system, such as removal of the commander from the military justice system, that have the potential to truly harm our units, our ability to obtain accountability and respond to the concerns of victims about the process.

The military is a unique environment. We ask Service members to have ultimate faith that their commanding officers will only risk their lives under the most necessary of circumstances. And, when operational requirements necessitate risk to their troops, that commanders have structured, trained, equipped, and disciplined their units in such a way as to minimize that risk to the greatest extent possible. To our military, the question of military discipline is fundamentally intertwined with the greater question of the commander's responsibility for operational readiness.

In addition to its potential broader impact on military readiness, removing the commander from the military justice system will not help us address the

concerns that victims have voiced about the process. In every Service, we have heard that victims are concerned about the length of the process, their inclusion and ability to voice preferences within the process, and the opacity of the system. Taking military justice decision-making authority away from commanders will exacerbate all of these problems. Instead, my hope is that the Panel will consider possible reforms that promise to make real change for the better, with the interests of victims in mind.

During his reconfirmation hearing before the Senate Armed Services Committee and in subsequent correspondence, the Vice Chairman of the Joint Chiefs of Staff provided senators with information regarding roughly 100 cases over the past few years in which, after civilians prosecutors declined to go forward on a sexual assault prosecution, the military took action. Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk-averse. Commanders zealously seek accountability when they hear there is a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline, and we need to maintain their ability to do so. The number of prosecutions in these types of cases may very well decline if the very commanders who have a vested interest in accountability are stripped of their power to deal with allegations regarding personnel in their units, in favor of independent military prosecutors.

I now turn to the topic of our allies' military justice systems. I recently met with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany, and conducted a survey of their military justice systems. From these conversations and additional research, we've learned quite a few things, some of which General Dempsey mentioned at his reconfirmation hearing. First, no allied country changed its system in response to sexual assault crimes specifically or the rights of victims generally. In most cases, commanders were removed as convening authorities to better

protect the rights of the accused, often in response to decisions by their domestic courts and/or the European Court of Human Rights. In contrast, the U.S. Supreme Court has repeatedly upheld the Uniform Code of Military Justice and the U.S military justice system as consistent with the Constitution and federal law.

Second, none of the allies I surveyed could draw a correlation between their new system and any increased or decreased reporting by victims of sexual assault. There was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims' willingness to report crimes. Similarly, we found no studies by our allies that examined the impact of the changes on prosecution rates, conviction rates, or processing times, although generally their cases now take longer.

It is also important to keep in mind that the scope and scale of our allies' caseloads are vastly different than ours. None of our allies handle the volume of cases the U.S. military does; this is likely due to the greater size of the U.S. armed forces in comparison.

Finally, the move by our allies to a more "civilianized" system mirrors a general global trend toward demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and will continue to be different. While many countries can afford for the center of their military justice systems to be located in the national capital, far from arenas of international armed conflict, we require a more flexible capability that can travel with a unit as it operates in any part of the world.

While there is no doubt that studying comparative law can provide useful insights into our own system, and perhaps provide inspiration for potential

changes, solutions that work for other countries, for unrelated reasons, may not be appropriate for us, to help us combat sexual assault in the military.

I have been very impressed and encouraged by the diligence that this Panel has shown in obtaining a thorough understanding of both the problem of sexual assault within the military and potential solutions. The depth with which you are studying this problem makes me optimistic that you will come up with solutions that have the potential to truly help us in this joint fight against this terrible crime. I promise my full support to this Panel, in whatever way I can, as you perform this very important work. Thank you for this opportunity to provide some observations and input into the process.